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In The
# Supreme Court of the United States
October Term, 1986

EVERGREEN TOWERS, INC.,

*Petitioner,*

vs.

CITY OF EAST ORANGE and ATTORNEY GENERAL OF THE STATE OF NEW JERSEY,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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## COUNTERSTATEMENT OF THE CASE

Petitioner, Evergreen Towers, Inc., is seeking, by writ of *certiorari,* to have this Court review a decision by the New Jersey Superior Court, Appellate Division, which the Supreme Court of New Jersey declined to review. Petitioner questions the constitutionality of *N.J.S.A.* 54:3-27 on due process grounds. This statute requires a property owner to pay the first three quarters of the current year's taxes assessed under the New Jersey Local Property Tax, *N.J.S.A.* 54:4-1 *et seq.,* in conjunction with filing a tax appeal with a County Board of Taxation challenging the assessment. A property owner's failure to comply with the payment requirement imposed by *N.J.S.A.* 54:3-27 may result in a dismissal of the appeal. The petitioner maintains that the Appellate Division judgment improperly affirmed the dismissal of its petition of appeal for nonpayment of the taxes in accordance with *N.J.S.A.* 54:3-27 on two primary grounds: first, because the assessment being challenged was allegedly deliberately imposed by the municipal tax assessor at an excessive level and was thus purportedly confiscatory, the assessment should not be the basis for a payment standard related to the prosecution of a tax appeal; second, because the petitioner was financially unable to pay the taxes due, it could not be constitutionally required to pay the taxes as a condition to prosecuting the appeal. This court recently denied *certiorari* in *Schneider v. East Orange*, 103 *N.J.* 115, —*A.*2d — (1986), *cert.* den. — *U.S.* — (1986), involving the constitutionality of the similar payment requirement applicable to tax appeals filed with the Tax Court of New Jersey.

Notwithstanding petitioner's assertion of unconstitutionality, the real basis for the dismissal of its tax appeal

was its unwillingness to comply with certain court-ordered discovery demands relating to the petitioner's financial status. Thus, the actual issue on appeal relates to the reasonableness of the discovery demands, a question clearly involving state law without implicating any federal right.

The petitioner owns property located at 134 Evergreen Place, East Orange, County of Essex, State of New Jersey. The respondents are the municipality of East Orange and the Attorney General of the State of New Jersey. The tax assessor for East Orange assessed petitioner's property for the 1980 tax year at $1,500,000 ($183,700—land, $1,315,300—improvement). Evergreen filed a petition of appeal with the Essex County Board of Taxation seeking a reduction in its property tax assessment. The County Board entered a judgment on November 15, 1980 reducing the assessment to $604,700 ($183,700—land, $421,000—improvement). At the time the County Board entered its judgment, petitioner had not fully paid three quarters of its 1980 taxes. The County Board, however, did not dismiss the petition for nonpayment of the taxes.

East Orange filed a complaint with the Tax Court of New Jersey challenging the County Board judgment and seeking an increase in the assessment. Thereafter, East Orange filed a motion for judgment with the Tax Court seeking reinstatement of the original assessment on the basis that the County Board should have dismissed petitioner's petition for nonpayment of the taxes required by *N.J.S.A.* 54:3-27. The Tax Court entered an order on September 9, 1983 granting East Orange's motion. Consequently, the judgment of the Essex County Board of Taxa-

tion was reversed and the original assessment was reinstated.

Petitioner filed a motion for rehearing on September 1, 1983 with the Tax Court maintaining that the original assessment was grossly in excess of the property's value and it was financially unable to pay the tax. The Tax Court entered an order on November 9, 1983 which granted the motion for rehearing limited,

> . . . to the question of what the original assessment was for any of the years relevant to this proceeding and to facts contributing constitutional aspects of a financially burdensome assessment.

The order also required petitioner to notify the Attorney General of the constitutional challenge to *N.J.S.A.* 54:3-27. The Attorney General was thereafter permitted to intervene as a party solely in defense of *N.J.S.A.* 54:3-27. East Orange moved before the Tax Court to vacate the order for rehearing on the grounds that petitioner failed to answer supplemental interrogatories regarding the financial status of its shareholders. The order was granted by the Tax Court, resulting in the entry of a final judgment reinstating the original assessment of the subject property. Evergreen filed a notice of appeal with the Appellate Division on January 31, 1985 from the whole of the judgment.

The Appellate Division, in a decision dated March 20, 1986, held that the trial court had given petitioner adequate opportunity to advance the position that it was financially unable to pay the tax in accordance with *N.J.S.A.* 54:3-27 and that petitioner's failure to provide relevant information in the context of discovery on said issue warranted a dismissal of its complaint (App. 1A). Petitioner

filed a notice of petition for certification with the Supreme Court of New Jersey seeking to challenge the whole of the Appellate Division judgment. The Supreme Court of New Jersey entered an order on June 27, 1986 denying the petition for certification (App. 10A).

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## ARGUMENT

### SINCE THIS CASE INVOLVES THE NARROW ISSUE OF THE REASONABLENESS OF THE NEW JERSEY COURTS' DISMISSAL OF PETITIONER'S TAX APPEAL FOR NONCOMPLIANCE WITH CERTAIN DISCOVERY DEMANDS, CLEARLY NO FEDERAL CONSTITUTIONAL ISSUE IS DIRECTLY IMPLICATED SO AS TO WARRANT THE EXTRAORDINARY RELIEF OF GRANTING THE PETITION FOR CERTIORARI.

In accordance with *N.J.S.A.* 54:3-21, a taxpayer or a municipality may file an initial tax appeal with a County Board of Taxation questioning the assessed value of property under the New Jersey Local Property Tax, *N.J.S.A.* 54:4-1 *et seq.* In the event that the assessment being challenged exceeds $750,000, either party may file a direct appeal with the Tax Court of New Jersey, thus bypassing the County Board of Taxation as the initial appeal forum. If the initial appeal is heard at the County Board level, any party dissatisfied with the judgment entered by the County Board may file an appeal with the Tax Court in accordance with *N.J.S.A.* 54:2-39.

The Legislature established certain payment requirements of the current year's taxes related to the filing of

tax appeals with both the County Boards of Taxation and the Tax Court. *N.J.S.A.* 54:3-27 provides that,

> A taxpayer who shall file an appeal from an assessment against him shall pay to the collector of the taxing district no less than the first three quarters of the taxes assessed against him for the current tax year in the manner prescribed in R.S. 54:4-66 even though his petition to the county board of taxation might request a reduction in excess of one quarter of the taxes assessed for the full year. The collector shall accept such amount, when tendered, give a receipt therefor and credit the taxpayer therewith, and the taxpayer shall have the benefit of the same rate of discount on the amount paid as he would have on the whole amount.

This statute requires the payment of the first three quarters of the taxes assessed in conjunction with the filing of a tax appeal with a county board of taxation.

With regard to tax appeals filed by taxpayers with the Tax Court, the Legislature required, under *N.J.S.A.* 54:2-39,* that payment of all taxes due must be made at the time of filing a complaint as a condition to perfecting the appeal. This statute provides that:

> Any party who is dissatisfied with the judgment of the county board of taxation upon his appeal may seek review of that judgment in the Tax Court by filing a complaint with the Tax Court, pursuant to rules of court within 45 days of the service of the judgment of the county board, and the Tax Court shall hear and determine all such matters and render its judgment thereon.

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* *N.J.S.A.* 54:2-39 was repealed by *L.* 1983, *c.* 45, effective January 28, 1983. In its place, the Legislature enacted *N.J.S.A.* 54:51A-1, which essentially incorporates the same standards contained in *N.J.S.A.* 54:2-39.

> At the time that a complaint has been filed with the Tax Court, *all taxes or any installments thereof then due and payable for the year for which review is sought must have been paid.* No interest shall be due and payable by the appellant for the period from November 1 of the current tax year to the date of filing the complaint. [Emphasis supplied].

Petitioner contends that the Appellate Division and Tax Court, in reinstating the original assessment and thereby reversing the County Board judgment, so construed *N.J.S.A.* 54:3-27 as to deny petitioner the opportunity to contest the purportedly excessive assessment. Such a result, petitioner maintains, constituted an improper application of *N.J.S.A.* 54:3-27 so as to deny it procedural due process. Petitioner is incorrect in its assertion on both factual and legal grounds. On a factual basis, petitioner was accorded the right to present facts at a hearing as to the unconstitutional application of *N.J.S.A.* 54:3-27, particularly with regard to its inability to pay the allegedly excessive tax. The trial court reversed the County Board judgment because of petitioner's refusal to comply with certain discovery demands relating to such a hearing. Thus, petitioner, because of its noncompliance with discovery demands, consciously determined not to avail itself of a hearing at the Tax Court level. The Appellate Division correctly noted that, "Defendant was given every opportunity for a hearing to provide that compliance with the statute would be financially burdensome and failed to abide by the requirements of the Rules of Court." (App. 9A).

This Court has consistently held that it will intervene in the state judicial process only to correct wrongs of a federal constitutional dimension and not to interfere with

issues that are a matter of state constitutional, statutory or common law. *Smith v. Phillips*, 455 *U.S.* 209, 221 (1982). In evaluating issues concerning state law, a federal court should defer to the determinations by the state court. *Kolender v. Lawson*, 461 *U.S.* 352, 355 (1983). In this case, petitioner's tax appeal was dismissed simply as a result of petitioner's failure to comply with reasonable discovery demands relating to the issue of financial ability to pay the local property tax assessment. The dismissal of the tax appeal thus did not involve federal constitutional questions. The Tax Court had specifically provided petitioner with the opportunity to submit proofs as to its inability to pay the property taxes as well as the purported excessiveness of such taxes. Petitioner voluntarily did not pursue its legal remedies to submit appropriate proofs and should not be permitted now to raise federal constitutional challenges to the validity of *N.J.S.A.* 54:3-27 that are premised on a nonexistent factual record.

However, even if petitioner's failure to submit the proper proofs were to be overlooked, it is, nevertheless, clear, from a federal constitutional standpoint, that *N.J.S.A.* 54:3-27 is facially valid. The due process concept is flexible and requires procedural safeguards which are appropriate for a particular situation. *Morrissey v. Brewer*, 408 *U.S.* 471, 481 (1972). A tax assessment is validly imposed if the taxpayer is provided with an opportunity to challenge the levy before a competent tribunal prior to the assessment being irrevocably fixed. *Nickey v. Mississippi*, 191 *U.S.* 393, 396 (1934).

This Court has established three factors to be considered in determining whether a statutory scheme denies a party procedural due process:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail. [*Mathews v. Eldridge*, 424 *U.S.* 319, 335 (1976)]

On a facial analysis, it is clear that *N.J.S.A.* 54:3-27 is consistent with due process concepts. First, a taxpayer's private interest is the temporary deprivation of his money. In accordance with *N.J.S.A.* 54:3-27.2, a taxpayer would be entitled to a refund from the municipality of any excess taxes paid together with interest from the date of payment at 5% per annum within 60 days of the date of final judgment.

Second, the tax appeal procedure provides a taxpayer with the full opportunity for a fair and comprehensive hearing. Petitioner already had the benefit of an initial hearing at the County Board level. At the Tax Court level, a taxpayer would be entitled to a trial *de novo* at which a full evidentiary hearing would be afforded, presided over by a Tax Court judge with special expertise in the area of property assessments. See *N.J.S.A.* 2A:3A-2 and 13; New Jersey Court Rule 8:1 *et seq.* A judgment entered by the Tax Court is further appealable as of right to the Appellate Division. New Jersey Court Rule 2:2-3 (a)(1). Thus, the administrative and judicial facets of the tax appeal process protect a litigant from any erroneous deprivation of the excess taxes.

Third, the interest of the municipality in receiving timely payment of property taxes is clearly significant and

outweighs any incidental burden imposed upon the taxpayer. The New Jersey Legislature, by enacting *N.J.S.A.* 54:3-27 and thereby requiring the payment of three quarters of an assessment in conjunction with filing an appeal at the County Board level, has recognized that tax revenues constitute the lifeblood of government and that timely payment is essential to the proper functioning of government. *Flora v. United States,* 362 *U.S.* 145, 176 (1960); *Phillips v. Commissioner,* 283 *U.S.* 589, 597 (1931). These policy considerations are particularly significant with regard to the prompt payment of a property tax which is by far the most important source of tax revenues for municipalities. *Rosewell v. LaSalle National Bank,* 450 *U.S.* 503, 527 (1981). Thus, in light of the significant interests of the municipality in securing the needed local property tax revenues, the relatively slight temporary deprivation of excess tax payments experienced by a taxpayer and the safeguarding of the taxpayer's interest through the tax appeal procedure, the taxpayer is not being deprived of due process by virtue of the payment requirement of *N.J.S.A.* 54:3-27.

In applying this analysis, this Court in *Schneider v. City of East Orange,* 196 *N.J. Super.* 587, 483 *A.*2d 839 (App. Div. 1984), aff'd 103 *N.J.* 115, — *A.*2d — (1986), *cert.* den. — *U.S.* — (1986), refused to review the decision by the New Jersey courts sustaining the constitutionality of *N.J.S.A.* 54:2-39 under due process and equal protection standards.* In *Schneider,* the New Jersey Appellate Di-

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* The equal protection issue arose in *Schneider, supra,* on the taxpayer's contention that the payment requirement under

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vision found the jurisdictional payment standard of *N.J.S.A.* 54:2-39 to be consistent with due process:

> Additionally, plaintiffs' right of due process has not been violated by such an interpretation of the statute. The critical components of due process are adequate notice, opportunity for a fair hearing and availability of appropriate review. *In re Suspension of Heller*, 73 *N.J.* 292, 310 (1977). The statutory procedures available to plaintiffs for the review of their assessments meet these requirements. *N.J.S.A.* 54:3-21, *et seq.* Plaintiffs' opportunity for appropriate review of the county board determination is not impaired by the added procedural limitation that taxes then due be paid before the jurisdiction of the Tax Court can be invoked. The interest of the municipality in receiving timely payment of taxes is clearly significant and outweighs any incidental burden imposed upon plaintiffs, and other taxpayers similarly situated, by this jurisdictional requirement. *See Mathews v. Eldridge*, 424 *U.S.* 319, 335, 96 *S.Ct.* 893, 903, 47 *L.Ed.*2d 18, 33 (1976). It is well settled that a taxpayer may be required to pay the taxes then due as a condition to litigating the amount due. *General Trading Co. v. Taxation Div. Director*, 83 *N.J.* 122,

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*N.J.S.A.* 54:3-27 (which is not jurisdictional) is less onerous than the jurisdictional payment requirement imposed by *N.J.S.A.* 54:2-39 at the Tax Court level. The taxpayer maintained that those taxpayers, whose property was assessed in excess of $750,000, could file directly with the Tax Court and only be subject to the payment standard of *N.J.S.A.* 54:3-27, while taxpayers of lesser assessed properties were subjected to the stricter payment standard of *N.J.S.A.* 54:2-39 when appealing to the Tax Court. The court in *Schneider, supra,* sustained *N.J.S.A.* 54:2-39, finding a rational basis for requiring a jurisdictional payment standard under *N.J.S.A.* 54:2-39 since taxpayers challenging county board judgments have had the benefit of a prior *quasi*-judicial hearing. 196 *N.J. Super.* at 594-595, 483 *A.*2d at 842.

129 (1980); *N.Y., Susquehanna & W.R.R. v. Vermeulen*, 44 *N.J.* 491, 501, 502 (1965). [196 *N.J. Super.* at 595-596, 483 *A.*2d at 843].

This Court found no basis for reviewing the decision in *Schneider* and should similarly deny *certiorari* in this case.

In summary, therefore, the petitioner is seeking further review of a state court decision dismissing a tax appeal because of the petitioner's failure to comply with a court-ordered discovery directive. This dismissal relates to a narrow issue of New Jersey law that does not implicate any federal constitutional standard. In addition, *N.J.S.A.* 54:3-27 provides for a reasonable and fair payment standard that complies with due process concepts.

The petition for writ of *certiorari* plainly does not raise a question of constitutional dimension which would warrant the granting of such extraordinary relief. The decision by the New Jersey courts below involved judicial principles which were properly applied. Therefore, the petition should be denied.

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## CONCLUSION

For the aforementioned reasons, it is respectfully submitted that the petition for writ of *certiorari* should be denied.

Respectfully submitted,

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